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No. 92-537

In The

Supreme Court of the United States

October Term, 1992

GREAT LAKES DREDGE & DOCK COMPANY AND STEAMSHIP MUTUAL UNDERWRITING ASSOCIATION (BERMUDA), LTD.,

Petitioners,

versus

DONALD GREGORY LINTON and TELETHIA LINTON,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I.

Whether the Fifth Circuit Court of Appeals correctly reversed and remanded this matter to the District Court with instructions to remand same to the Louisiana State District Court from which it was removed upon a finding that a trial by jury in state court of a Jones Act and General Maritime Law claim is not required as a matter of federal law.

LIST OF PARTIES

The following are the parties who have an interest in this proceeding:

1. Donald Gregory Linton
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   Schriever, LA 70394

2. Telethia A. Linton
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3. Charles B. Plattsmier
   William D. Hunter
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   Morgan City, LA 70381

4. Great Lakes Dredge & Dock Company
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5. The Steamship Mutual
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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(1) The Merchant Marine Act (The Jones Act), 46 App. U.S.C. § 688(a) (West 1992):

> (a) Application of Railway Employee Statutes; Jurisdiction
>
> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain, an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; . . .

(2) La. Code Civ. Proc. Art. 1732 (West 1988): A trial by jury shall not be available in:

(1) A suit where the amount of no individual petitioner's cause of action excess twenty thousand dollars exclusive of interest and costs.

(2) A suit on an unconditional obligation to pay a specific sum of money, unless the defense thereto is forgery, fraud, error, want, or failure of consideration.

(3) A summary, executory, probate, partition, mandamus, habeas corpus, quo warranto, injunction, concursus, worker's compensation, emancipation, tutorship, interdiction, curatorship, legitimacy, filiation, annulment of marriage, or divorce proceeding.

(4) A proceeding to determine custody, visitation, alimony, or child support.

(5) A proceeding to review an action by an administrative or municipal body.

(6) A suit on an admiralty or general maritime claim under federal law that is brought in state court under a federal "saving to suitors" clause, if the plaintiff has designated that suit as an admiralty or general maritime claim.

(7) All cases where a jury trial is specifically denied by law.

(3) U.S. Const., Art.III, § 2,Cl.1. Jurisdiction of Courts: Section 2. The judicial power of the United States shall extend to all Cases in Law and Equity, arising under this Constitution, the Laws of the United States and treaties made, or which shall be made, under their Authority; . . . To all Cases of Admiralty and Maritime Jurisdiction; . . .

(4) U.S. Const., 7th Amdt. - Civil Trials: In Suits in common-law, with a value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common-law.

(5) 28 U.S.C. § 1333. Admiralty, Maritime and Prize Cases (West 1992):

The District Court shall have original jurisdiction, Exclusive of the Courts of the State, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in call cases all other remedies to which they are otherwise entitled.

(6) 28 U.S.C. § 1445 (a) A civil action in any state court against a railroad or its receivers or trustees, arising out of sections 51-60 of Title 45, may not be removed to any district court of the United States.

STATEMENT OF THE CASE

Donald Gregory Linton, a seaman in the employ of Great Lakes Dredge & Dock Company sustained injury aboard one of his employer's vessels. Linton chose to

pursue a Jones Act claim for negligence and a General Maritime Claim for unseaworthiness and maintenance and cure against his employer/vessel owner in a Louisiana State Court. By an amended petition, Telethia Linton, his wife has been joined seeking recovery for her loss of consortium. The original petition sought a trial by jury.

During the course of the litigation, the plaintiff sought to avail himself of the Louisiana Code of Civil Procedure, Article 1732(6) which allows a plaintiff in a maritime action brought in state court to determine whether the matter should go to a judge or jury as the trier of fact. The plaintiff's request to delete the jury in this state court matter was granted by the state court judge. Within the appropriate delays, the vessel owner/employer filed a Notice or Removal pursuant to 28 U.S.C. § 1441. In response, the plaintiff/seaman filed a Motion for Remand in a timely fashion pursuant to 28 U.S.C. § 1447(c). The Honorable John M. Shaw, United States District Judge for the Western District of Louisiana (Lafayette/Opelousas Division) denied the plaintiff's Motion for Remand finding that removal was indeed proper. The District Court's ruling contained a statement that the order rendered involved a controlling question of law as to which there was a substantial ground for difference of opinion.

The plaintiff/seaman filed a petition for appeal pursuant to the provisions of Section 1292(b), Title 28 of the United States Code. The Fifth U.S. Circuit Court of Appeals granted the plaintiff's petition for appeal and, on June 22, 1992, the Fifth Circuit Court of Appeal reversed the ruling of the District Court issuing an opinion and

judgment which remanded the matter to the state court in Louisiana.

SUMMARY OF THE ARGUMENT

The petitioners in this matter have not shown any special reason, within the considerations governing a review of a writ of certiorari, why the court should grant this petition. The petitioner's contention begins with the proposition that the Louisiana Legislature encroached upon the original and exclusive maritime jurisdiction of the federal court when it provided a procedural device to allow the injured seaman seeking redress in a state court the exclusive ability to choose whether the fact finder was to be a jury or a judge. Rather than challenging the constitutionality of the statute through the state court system, the petitioners herein sought to give effect to what they earlier contended was an unconstitutional statute by removing the matter to the federal court system. The petitioners argue that the Fifth Circuit's holding in this matter, that actions brought in state court pursuant to the Savings Clause are not required to be tried before a jury, was erroneous. From that position, the petitioners seek to boot strap themselves into other constitutional arguments suggesting that such a ruling violates Article III, Section 2 of the United States Constitution or was an erroneous interpretation of the federal removal statute.

There is no basis for the proposition that a Jones Act or General Maritime Claim brought in state court pursuant to the Saving to Suitors Clause requires that the matter be tried by a jury. No statute nor decisional law

mandates such a conclusion. This is not "an important question of federal law which has not been, but should be, settled by" the United States Supreme Court. Accordingly, none of the criteria under Rule 10 of the Rules of the Supreme Court of the United States apply.

ARGUMENT

A. Certiorari Should Be Denied Because Petitioners Failed To Present Any Facts To Support The Allegation That Louisiana State Courts Are Developing Their Own Body Of Maritime Law.

State courts may assume subject matter jurisdiction over a federal cause of action absent a provision by Congress to the contrary or a disabling incompatibility between the federal claim and a state court adjudication. The state and national governments exercise concurrent sovereignty, although the constitution limits the powers of each and requires the states to recognize federal law as paramount. Federal law confers rights binding on state courts, the subject matter jurisdiction of which is governed in the first instance by state laws. A court must therefore begin with the presumption that state courts enjoy concurrent jurisdiction. *Gulf Offshore Company v. Mobil Oil Corporation*, 453 U.S. 473 69 L.Ed.2d 784, 101 S.Ct. 2870 (1981)

Federal courts are competent to adjudicate causes of action arising out of General Maritime Law pursuant to jurisdiction conferred by Article III, Section 2 of the United States Constitution and the enabling legislation, 28 U.S.C. § 1333(1). Federal courts also have the right to

adjudicate these causes of action when there is an independent basis for jurisdiction such as diversity of citizenship. State courts have concurrent jurisdiction over causes of action in personam which are founded in the General Maritime Law, inasmuch as 28 U.S.C. § 1333 saves "to suitors in all other cases all of the remedies to which they are otherwise entitled." It is beyond question that state courts must apply the same substantive law to a maritime case brought in that forum as would be applied in the federal court. *Southern Pacific Company v. Jensen*, 244 U.S. 205, 61 L.Ed. 1086, 37 S.Ct. 524 (1917)

The Supreme Court of Louisiana has formally acknowledged these principles. Indeed, in *Lavergne v. Western Company of North America, Inc.*, 371 So.2d 807 (1979) the Louisiana Supreme Court held that a plaintiff who brought an in personam action in state court based on General Maritime Law did have a right to trial by jury because the right to trial by jury is procedural in nature. The court held that affording the plaintiff such a right did not conflict with substantive admiralty law. The court stated:

> "It has long been established that a state court having concurrent jurisdiction with the federal courts as to in personam admiralty claims is free to adopt such remedies and to attach to them such incidence as it sees fit so long as it does not attempt to modify or displace essential features of the substantive maritime law." Id at 810

There has been no showing by petitioners that Louisiana state courts are attempting to develop a body of "maritime law" in contravention of the United States Constitution.

B. The Louisiana Statute Creates A Procedural Device For Selecting The Trier Of Fact

In 1988, the State of Louisiana, exercising its sovereign right to control procedures within its courts, amended Code of Civil Procedure Article 1732 to provide a new sub-part (6) to read as follows:

> "A trial by jury shall not be available in: . . . (6) A suit on an Admiralty or General Maritime claim under federal law that is brought in state court under a federal "Saving to Suitors" clause, if the plaintiff has designated that suit as an admiralty or general maritime claim."

In *Heinhuis v. Venture Associates, Inc. of Louisiana*, 558 So.2d 1244 (La. App. 1st Cir, 1990) the court interpreted Article 1732(6) and stated:

> "Obviously the amended petition was drawn in an attempt by plaintiffs to elect a non-jury trial, a remedy recently granted them by the Louisiana Legislature."

The court went on to explain the purpose of the statute as being purely procedural and quoted from the author of the bill during a committee hearing of the 1988 Louisiana Legislature. The author of the bill explained, in part:

> "House Bill 610 . . . is a simple bill. What it actually does . . . there is some inconsistency in the Louisiana jurisprudence compared to the federal jurisprudence with respect to rights of jury trials and maritime actions, particularly admiralty cases brought under the Saving to Suitors Clause.

* * *

> So, all I'm trying to do is track exactly the Federal Rules of Procedure in essence saying you as the complainant or the seaman have the right to control the actions of whether or not you want a jury trial or not."

Most recently in *Parker v. Rowan Companies, Inc.*, 599 So.2d 296 (La. 1992) the Louisiana Supreme Court on rehearing affirmed the reasoning displayed by the First Circuit Court of Appeals in the Heinhuis decision. The Supreme Court specifically stated,

> "In all events, it is our conclusion that the Legislature, in passing the amendment to Article 1732, intended to and did achieve for the plaintiff seaman the same exclusive choice of bench or jury trial in Jones Act cases in the state courts which prevails in federal court.
>
> * * *
>
> Granting a Jones Act seaman a right to a state court bench trial does not 'modify or displace the essential features of the substantive maritime law.' ". (Respondent notes and therefore advises the court that a Petition for Certiorari has been filed in the Parker matter now before this U.S. Supreme Court under docket number 92-221.)

From the foregoing it is clear that the Louisiana Supreme Court understands and intends to abide by Federal substantive maritime law. The petitioners' assertion to the contrary is not predicated upon any factual basis nor is it well founded in Louisiana's jurisprudence.

C. The Savings Clause Does Not Mandate A Jury Trial In A State Court Over Jones Act And General Maritime Law Claims.

As has been pointed out, Louisiana's purpose and intent in creating Article 1732(6) was simply to provide the plaintiff/seaman with the right to choose whether to try his claims to a fact finder consisting of a jury or to a judge sitting alone. *Parker v. Rowan Companies, Inc.*, supra In *Red Cross Line v. Atlantic Fruit Company*, 264 U.S. 109, 44 S.Ct. 274, 68 L.Ed. 582 (1924) the U.S. Supreme Court stated:

> "The 'right of a common law remedy' so saved to suitors, does not . . . include attempted changes by the states in the substantive admiralty law, but it does include all means other than proceedings in admiralty which may be employed to enforce the right or redress the injury involved. . . . A state may not provide a remedy in rem for any cause of action within the admiralty jurisdiction. But otherwise, the state having concurrent jurisdiction, is free to adopt such remedies, and to attach to them such incidence, as it sees fit." (Citations omitted).

The Fifth U.S. Circuit Court of Appeals acting in this matter concluded that:

> "A non-jury trial in state court is not, in and of itself, offensive to the General Maritime Law and – absent any pretense at in rem proceedings – does not constitute an attempt to create an admiralty side of state court. In view of the revised wording of the "Saving to Suitors" clause and Supreme Court authority, a jury trial is not a required element of a 'Saving to Suitors' remedy. Stated differently, a maritime non-jury

> action is not necessarily outside the 'Saving to Suitors' clause and within the exclusive admiralty jurisdiction of the federal courts.
>
> * * *
>
> We also hold that the election of a non-jury trial in state court by a Jones Act plaintiff does not, of itself, automatically force the case into the exclusive federal admiralty jurisdiction." *Linton v. Great Lakes Dredge & Dock Company,* 964 F.2d 1480 (5th Cir., 1992)

It is respectfully submitted that the Fifth Circuit acting in this matter has correctly interpreted Louisiana's intent when enacting Article 1732(6), a view which has been confirmed by the Louisiana Supreme Court's recent decision in *Parker v. Rowan Companies, Inc.*, supra. Further, the Fifth Circuit decision is perfectly in accordance with the Supreme Court's decisions in this area, specifically *Red Cross Line v. Atlantic Fruit Company,* supra. Accordingly, the Fifth Circuit has not decided an important question of federal law in a way that conflicts with applicable decisions of this Court.

D. Removal Was Never Proper And Was Not The Proper Vehicle for Challenging Article 1732(6)

Certiorari in this matter is totally unwarranted inasmuch as removal of this case from the state courts of Louisiana was totally improper. The sole and exclusive basis upon which removal was justified was that plaintiff's 1732(6) designation created a request for an exclusive admiralty remedy which permitted removal directly into the admiralty side of federal court. That position flies directly in the face of this Court's decision in *Romero v.*

International Terminal Operating Company, 358 U.S. 354, 3 L.Ed.2d 368, 79 S.Ct. 468 (1959) which made it clear that except in diversity cases, maritime litigation brought in state courts could not be removed to the federal system. This is also not an area where the Legislature has failed to act. Congress has expressly provided that Jones Act claims commenced in state court are not removable. 28 U.S.C. § 1445(a) As has been demonstrated, the Louisiana Supreme Court has held that it was not the Louisiana Legislature's intent in enacting 1732(6) to somehow create a right to maintain actions "in admiralty" in a state court forum. *Parker v. Rowan Companies, Inc.*, supra. If the petitioners in this certiorari request felt as though Article 1732(6) sought to create an admiralty side of state court or that it ran afoul of the Saving to Suitors Clause, then theoretically such an attempt by the Louisiana Legislature would be in violation of 28 U.S.C. § 1333, Article III, Section 2 of the United States Constitution, as well as the Supremacy Clause of the United States Constitution. Hence, such a piece of legislation would presumably be invalid and a challenge to such a piece of legislation would be through the state court system and then on writ of certiorari to the United States Supreme Court on constitutional grounds. Removal was clearly not the appropriate vehicle. To permit removal of this matter from a state court to a federal court on the perceived defect of 1732(6) as suggested by the petitioners herein would, in effect, breathe constitutional validity into an act of the state Legislature which, under the interpretation that the petitioners request that the Court provide to Article 1732(6), the Legislature is constitutionally prohibited

from doing! It is respectfully submitted that the defendants have attempted to utilize the guise of removal to circumvent their inability to seek an appeal of the interpretation of 1732(6) to a federal district court. Removal is not proper in this case and the Fifth Circuit decision below was correct when it stated:

> " . . . the election of a non-jury trial in a state court by a Jones Act plaintiff does not, of itself, automatically force the case into the exclusive federal admiralty jurisdiction. There is no need to make in personam actions affected by Louisiana Article 1732(6) removable to federal court in order to maintain the desire to uniformity of admiralty law. We reject the district court's conclusion to that effect. The judgment of the district court denying remand was error; this case is not within the exclusive federal admiralty jurisdiction and is not otherwise removable." *Linton v. Great Lakes Dredge & Dock Company*, 964 F.2d 1480 (5th Cir., 1992)

CONCLUSION

The petitioners have not demonstrated any special or important reasons why a writ of certiorari should be granted nor, specifically, have the petitioners identified any of this Court's criteria as set forth in Rule 10 which would cause this Court to exercise its discretion in favor of granting this request for certiorari. The Louisiana Legislature has created a procedural rule and has not attempted to invade the province of the Admiralty jurisdiction of this Court. The Fifth U.S Circuit of Appeals below has correctly determined that a non-jury trial in a

state court is not in and of itself offensive to the General Maritime Law. That decision is in accordance with prior Supreme Court cases which do not require a jury trial as an element of a "Saving to Suitors" remedy. Removal of Jones Act and General Maritime cases from the state court system has been prohibited both by Congress in the area of Jones Act litigation, and by the U.S. Supreme Court with regard to General Maritime claims (absent diversity of citizenship). Remand was improper and the Fifth Circuit's decision in that regard was correct.

Denial of the writ of certiorari in this matter will work no injustice in this case because a remand to the state court system is clearly proper. Further, this Court has before it on application for writ of certiorari, *Parker v. Rowan Companies, Inc.*, 599 So2d 296 (La. 1992) Pet. for Cert. filed under docket number 92-221, (U.S. July 31, 1992). Thus the Supreme Court's decision in *Parker* will directly affect the outcome of this case once it has been remanded to the state court system. For these reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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